D' TREND CHAIN STORES SDN. BHD.

v.

KOPERASI INSURANS (M) BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[ORIGINATING SUMMONS NO. C 31-107-86]
21 OCTOBER 1986

CIVIL PROCEDURE: *Insurance policy - Whether there is any dispute to the amount claimed - Whether to appoint an arbitrator - Application for extension of time to file claim - Condition precedent to right of action or suit - When award of arbitrator to be obtained first - Sufficient allegation of fraud - Effect.*

This was an application by the plaintiff for an order of the Court appointing an arbitrator in respect of a dispute arising out of an insurance policy. The plaintiff took out a fire insurance policy on 22 January 1985, and on 21 April 1985, the insured items were damaged by fire. The plaintiffs then submitted a claim and gave notice to appoint an arbitrator. The defendants replied that they were still investigating the matter. On 30 March 1986, the plaintiffs wrote to the defendants notice of dispensation of the limitation period under the policy. Later the defendants wrote to disclaim liability.

Clause 18 of the fire insurance policy states, *inter alia:*

> If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference ...

The plaintiffs also asked in the alternative that in the event no arbitration is allowed, extension of time be given to them to file their claim.

Held:

[1] There was no evidence of any dispute as to the differences between the amount claimed as what the defendants have done was to disclaim liability. Accordingly, the plaintiffs are not entitled to refer the matter to arbitration.

[2] Under Clause 18 of the policy, it is a condition precedent to any right of action or suit upon the policy that the award of an arbitrator shall first be obtained. Since there is no arbitration, the question of extending the limitation period does not arise.

[3] Even if this matter should go for arbitration, in view of the allegation of fraud made by the defendants, the matter should not be referred to arbitration.

[Application dismissed with costs.]

Case referred to:
Redford v. Hair & Ors. [1971] 2 All ER 1089

For the plaintiffs - Kartar Singh; M/s. Bachan & Kartar
For the defendants - K.W. Yang; M/s. Azim, Ong & Krishnan

JUDGMENT

Zakaria Yatim J:

This is an application by the plaintiffs for an order of the Court that Mr. Khoo Eng Chin, an advocate and solicitor, practising at Messrs Khoo and Sidhu, Kuala Lumpur or some other fit and proper person be appointed to act as an arbitrator in respect of a dispute *inter se* the plaintiffs and the defendants arising out of a policy of insurance number FR/40119. The plaintiffs also ask for further or other order as the Court deems fit, and costs.

The plaintiffs took out a fire insurance policy on 22 January 1985 in respect of their stock-in-trade, furniture, furnishings, fittings and fixtures against loss or damage by fire. The policy was effective from 3 January 1985 to 3 January 1986 and the policy number is FR/40119. On 21 April 1985, there was a fire at the plaintiffs' premises and the insured items were damaged by fire. The plaintiffs claim that they have suffered loss and damage. On 2 November 1985, the plaintiffs submitted a claim to the defendants and on 7 February 1985, the plaintiffs' solicitors gave notice to appoint Mr. Khoo Eng Chin to act as an arbitrator. The defendants' solicitors on 30 January 1986 replied that, they were in the process of investigating the plaintiffs' claim. On 7 February 1986, the solicitors for the plaintiffs again wrote to the defendants for their consent that Mr. Khoo be appointed as an arbitrator. On 15 February 1986, the defendants and their wrote to the defendants notice of dispensation of the limitation period under the said policy. There was no reply to this letter from the defendants. On 12 April 1986, the defendants wrote to the plaintiffs disclaiming any liability.

Mr. Kartar Singh, Counsel for the plaintiffs submitted that the matter be referred to arbitration under Clause 18 of the fire insurance policy. Clause 18 states:

> If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or, if they cannot agree upon a single arbitrator, to the decision of two disinterested persons as arbitrators, of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party. In case either party shall refuse or fail to appoint an arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint a sole arbitrator; and in case of disagreement between the arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings. The death of any party shall not revoke or affect the authority or powers of the arbitrator, arbitrators or umpire respectively; and in the event of the death of an arbitrator or umpire, another shall in each case be appointed in his stead by the party or arbitrators (as the case may be) by whom the arbitrator or umpire so dying was appointed. The costs of the reference and of the award shall be in the discretion of the arbitrator, arbitrators or umpire making the award. And it is hereby expressly stipulated and declared that **it shall be a condition precedent to any right of action of suit upon this Policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained."** [Emphasis added].

In my opinion, there is no evidence of any dispute as to the differences between the amount claimed. What the defendant have done in this case is to disclaim any liability and this is different from disputing the differences in the amount claimed. Since there is no evidence of any differences in the amount claimed, the plaintiffs are not entitled to refer the matter to arbitration.

Mr. Kartar Singh asked in the alternative that in the event no arbitration is allowed, extension of time be given to the plaintiffs to file their claim. Under Clause 18 of the policy, it is a condition precedent to any right of action or suit upon the policy that the award of an arbitrator shall first be obtained. Since there is no arbitration, the question of extending the period of limitation does not arise. Mr. K.W. Yang, Counsel for the defendants pointed out that the plaintiffs had time to file in the writ. According to him, on 11 April 1986, the defendants' solicitors wrote a letter to the plaintiffs' solicitors stating that the defendants were repudiating liability in respect of the fire occurring at the said premises on 21 April 1985. It is clear from this letter that the defendants were repudiating liability and according to Mr. Yang, the plaintiffs had time until 21 April 1986 that is before the expiry of the limitation period, to file an action against the defendants. But the plaintiffs failed to do so.

Even if this matter should go for arbitration, in view of the allegation of fraud made by the defendants, the matter should not be referred to arbitration. In his affidavit, affirmed on 14 August 1986, Mr. Yang averred that the defendants were not liable under the said policy on the ground of fraud. According to him there was sufficient evidence to "implicate the plaintiffs in the arson which was established in the report of the fire brigade authorities". He added that particulars of the said evidence could be provided at the appropriate time of the trial if an action is commenced by the plaintiffs. A copy of the said Fire Brigade Authorities Report was attached to Mr. Yang's affidavit. According to the report of the Fire Brigade, it is believed that the fire was deliberately started by people who are not known.

In my opinion, the defendants have made sufficient allegation of fraud. In *Redford v. Hair & Ors.* [1971] 2 All ER 1089 it was decided that an application for stay of proceedings pending arbitration was refused because of allegations of fraud. In that case, the defendants who sought an order to stay for further proceedings under s. 4 of the English Arbitration Act 1950 made an allegation similar to fraud against the plaintiff. The Court held that the defendants' application for a stay would be dismissed because defendants' allegations were akin to allegations of fraud and against such allegations a plaintiff is entitled to have the case tried by a Judge in Open Court. In *Ng Chin v. Lai Siew Wah Sdn. Bhd.* Civil Suit No. C 2728 of 1983 (Unreported), I ruled that even if the allegation of fraud was made by the plaintiff, a stay should not be allowed.

In the circumstances I dismiss the application with costs.

Also found at [1987] 1 CLJ 394